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November 22, 2004

Chief Water Judge C. Bruce Loble
Montana Water Court
P.O. Box 1389
Bozeman, MT 59771-1389

RECEIVED

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Re: Draft Water Court "On Motion" Rules

Montana Water Court

Dear Judge Loble:

Thanks for the opportunity to review your proposed "On Motion" and other rules. Our comments will be brief, and we invite you to give us a call if you wish to further discuss any of the following matters.

In regard to the actual examination rules, the DNRC thinks it would be useful to retain the reference to the rules as the Montana Supreme Court Water Right Claim Examination Rules because we believe that is a useful reminder to water users of where the rules come that mandate how their water right claims are examined.

Our contacts with water users tell us more details on the actual "on motion" process would be useful. Most water users who would be coming before the Water Court will not be familiar with this or any other type of court process. We think it would be useful to have a step-by-step narrative from the Water Court that describes just what happens when a water user is called before the Water Court "on motion," and perhaps also post it on the web. Knowing the process and what is expected of them and in what order should do a lot to alleviate the anxieties of water users appearing before a court for the first time. Since the Water Court is most aware of its procedures it is in the best position to set it out.

The DNRC also believes the "on motion" rules should set out which substantive issue remarks that affect accuracy and enforcement, at a minimum, will definitely be called in. Water users should know which issue remarks will be called in though, so that they can go in and see if they can resolve such issue remarks early on in the process. A standing order or rule that water users need to discuss the issue remarks with the DNRC early on and try to resolve them through appropriate amendments to claims, which have to be approved by the Water Court, would also be useful. In regard to others that would not have to be called in, the DNRC would assist in any effort along with others to help identify any issue remarks that would not have to be called in because they are of such minimal importance to the accuracy of the water right or usefulness during enforcement.

In regard to the other rules accompanying the proposed “on motion” rules, the DNRC has the following comments:

RULE 1.II(7) “...the water court ~~may~~ shall issue such orders...”

Rule 1.II (9) “shall be ~~addressed~~ resolved by the water court...”

RULE 1.II (11) “...the notice ~~may~~ shall also be published once...”

Rule 1.II. (23) (Settlements.) says, if sufficient evidence to meet the burden of proof is not presented....the WC shall not enlarge or expand the element of the claim.

Comment: What if enough evidence to enlarge or expand an element is presented, isn't there any concern about due notice to other claimants who did not object? See Motion to Amend Rule 1.II(12) where notice is determined pursuant to 85-2-233(6), MCA.

RULE 1.II (25) “...and issue remarks have been ~~addressed~~ resolved; all wildlife...”

Rule 1.III. (10) “...means the original, electronic ~~and~~ microfilm or scanned...”

Insert RULE 1.III (56A – or renumber)

“Scanned record” means a digitally scanned record of paper documents related to a water right.”

Insert RULE 1.III (19A – or renumber)

“Enforceable priority date means an administrative priority date of 6-30-1973 for claims received after May 7th 1982 and received or postmarked on or before July 1, 1996, unless the enforceable priority date is successfully challenged in accordance to 85-2-221(3)(f), MCA.”

RULE 1.IV (1)(C) “A microfilm or scanned record of each numbered claim file.”

RULE 1.IV(7) Reword to match language on page 19, Rule 1.II (25)

“...issued by the water court from the Department for a fee ~~of \$20.00 or~~ covering the cost of printing or electronic copy whichever is greater in accordance with 85-2-232(4), MCA. Indexes of decrees may be obtained for a fee ~~of \$12.50 or~~ covering the cost of printing or electronic copy whichever is greater.”

RULE 1.VI (2)(a) “ The examination materials ~~and summary report~~ will be available...”

RULE 1.VI (2)(B) “ a microfilm or scanned copy of the examination materials ~~and summary report~~ for a basin...”

Comment: There is no notice of a summary report, it seems to be a lot of extra work to microfilm or scan a document that has such a short life span.

Insert RULE 2.VIII(3) (c)

“(c) Late claims will be reviewed to determine subordination status pursuant to 85-2-221(3) MCA. For claims meeting 85-2-221(3)(f) MCA, the enforceable priority date will be set to June 30-1973 (11:59pm.).”

RULE 2.XI (3) (c) “...to complete the period of use to year round for claims involving water spreading systems, natural subirrigation and natural overflow when no period of use has been claimed or the period of use claimed is not year round and there are no other reasons in accordance to these rules to contact the claimant.”

RULE 6.V (3) (b) “ Examples: CLAIMS FILED LATE 08/01/85. AS MANDATED BY SECTION 85-2-221(3), MCA, THIS ~~CLAIM~~ CLAIM IS...”

Rule 6.XV.(1) (post-decree revisions) ***Comment: This rule indicates, DNRC will notify the court and claimant of errors, by letter OR objections. Subsection (2) says, DNRC will notify the court and the claimant by letter. These two cites appear to contradict.***

RULE 6.XV(3) “...the authorization will be microfilmed; or scanned, the correction...”.

EXHIBIT A: SUMMARY REPORT...

Make the following changes to the report:


-Priority Date: June 19, 1866 Enforceable Priority Date: June 19, 1866

Print the following after the diversion data and before the reservoir information:

-Period of Diversion: January 1 to December 31

Again, thank you for the opportunity to review the Water Court's proposed rules.

Sincerely,


for Jack Stults, Division Administrator
DNRC Water Resources Division